Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-277

ALLEN AARON JACKSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Claims

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Dated, August 17, 1977.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Allen Aaron Jackson respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on March 23, 1977.

OPINION BELOW

The opinion of the United States Court of Claims is reported at 551 F.2d 282 (Ct. Cl. 1977).

JURISDICTION

The judgment of the United States Court of Claims was entered on March 23, 1977, granting the motion

of the United States to dismiss the action brought by Petitioner. The Court of Claims denied a timely motion for rehearing on April 29, 1977. On July 18, 1977, this Court granted Petitioner's motion to extend the time for filing a Petition for Writ of Certiorari up to and including August 21, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims granted the United States' Motion to Dismiss on the basis of an improper and erroneous finding of fact, and on the basis of facts neither found in nor supported by the record.
2. Whether the Court of Claims erred in finding that Petitioner's claim, based on his enlistment contract with the Army, sounded in tort and not in contract.
3. Whether the Court of Claims erred in finding that the Army did not violate its enlistment contract with Petitioner.

STATUTORY PROVISION INVOLVED

28 U.S.C. §1491 (The Tucker Act):

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or

> for liquidated or unliquidated damages in cases not sounding in tort. . . .

STATEMENT OF THE CASE

This is an action for breach of contract by the United States. The United States Court of Claims has jurisdiction over this case pursuant to 28 U.S.C. §1491 (The Tucker Act).

On January 24, 1974, Petitioner Allen Aaron Jackson entered into a contract of enlistment for three years in the United States Army, at the recruiting station located at 615 West Van Buren Street, Chicago, Illinois. He signed the agreement on his own behalf, and Sergeant A. C. Kosik represented the Army.

As a condition of Petitioner's enlistment, Petitioner and Sergeant Kosik agreed that Petitioner did not wish to be assigned to a Military Occupation Specialty (MOS) which would subject him to dangerous combat-type military maneuvers and the physical hazards incident thereto. In addition, Petitioner wished to learn mechanics so that he could open a gas station or auto repair shop after his three years of training in the service. Accordingly, both parties to the agreement specifically stipulated that Petitioner would be assigned to automobile maintenance after his completion of basic training. The promise was written and embodied in "Statements For Enlistment, Delayed Entry Program" DA Form 3286-32-R, Paragraph 1(g)(2): "If enlisting for an Army school course, I am assured of attending school course 1st INF DIV

(M) Ft. Riley KS AND OJI MOS 63 A10 (MECHANICAL MAINT.)." Portions of the documents executed by Petitioner upon enlistment in the Army are appended hereto as Appendix A.

In accordance with the terms of the agreement, Petitioner completed basic training at Fort Leonard Wood, Missouri. On May 11, 1974, following his basic training, he arrived for regular duty at Fort Riley, Kansas, where he was assigned to a tank division, in breach of his agreement with the Army. Petitioner protested this assignment as a violation of the spirit and terms of his enlistment contract and contacted various Army personnel to effect a transfer to automobile mechanics school. Petitioner was scheduled to meet with M. Dane of the Army on May 20, 1974, to effectuate his transfer. This appointment, however, was cancelled by the tank unit commander, because the tank maneuvers which were scheduled to commence on that day, in which Petitioner had been ordered to participate, were "more important".

Participation in these combat maneuvers resulted in precisely those consequences which Petitioner had sought to avoid by means of the conditions of his enlistment contract whereby he was not to be assigned to combat maneuvers but to his MOS choice of mechanical maintenance. During the course of the maneuvers, Petitioner was required to run in front of the tanks and explode smoke grenades. When the tanks turned in Jackson's direction, he was run over and bisected by a tank; that is, he was literally cut in half. Both of Petitioner's legs were severed, as were his male organs, his rectum and his bowel. Of the organs below

the navel, only Petitioner's kidneys and bladder remain.

On June 25, 1976, Petitioner filed a verified petition in the United States Court of Claims seeking $5,000,000 for breach of contract. The petition is appended hereto as Appendix B. Petitioner based his claim not only on the oral agreement with Kosik, but on the express terms of the written enlistment agreement, Paragraph 1(g)(2), *supra*. *See also* Paragraph 1(g)(1) of that document which refers to Army Regulation A.R. 601-210.

On September 23, 1976, Respondent filed a Motion to Dismiss on the grounds that since Jackson's claim sounded in tort, the Court of Claims lacked jurisdiction under the Tucker Act, 28 U.S.C. §1491. Petitioner's Response to Defendant's Motion to Dismiss was filed on November 23, 1976. On March 23, 1977, without taking evidence and without hearing oral arguments, the Court of Claims dismissed Petitioner's claim. Petitioner's Motion for Rehearing was denied on April 29, 1977, again without presentation of evidence or oral argument.

REASONS FOR GRANTING THE WRIT

A. THE FINDINGS OF FACT MADE BY THE COURT OF CLAIMS WERE CLEARLY ERRONEOUS AND WERE BASED ON FACTS NEITHER FOUND IN NOR SUPPORTED BY THE RECORD.

The Court of Claims based its decision (appended hereto as Appendix C) in part on a finding that:

> Before the [Petitioner] could take the mechanical maintenance course he had to complete basic combat training. It is apparent that [Petitioner] had not complied with this requirement, as he had only been at Ft. Riley nine days when he engaged in basic combat training at the time of his injury. The [Petitioner] agrees that this is true. *Jackson v. United States, supra,* 551 F.2d at 284.

The question of whether Jackson had completed basic training prior to his injury is so fundamental to his claim that the record must be set straight in this respect. Petitioner's Response to Defendant's Motion for Dismissal, filed with the Court of Claims on November 23, 1976, expressly stated that Petitioner was assigned to Fort Riley *following* his basic training. Although Petitioner's initial verified petition to the Court of Claims (see Appendix B hereto) did not specifically address itself to this question, he stated therein, at Paragraph XI, that Petitioner had performed all the terms and conditions of the agreement between him and the Army which Petitioner was required to perform. This clearly included the successful completion of basic training. Petitioner has never maintained otherwise.

The United States has not disputed that Petitioner had completed basic training, nor could it do so on the basis of its own records. In fact, there was nothing in the record before the Court of Claims that could have provided any support whatsoever for this finding.

The Court also found that according to the enlistment documents, Petitioner "could be placed in any

assignment at any time according to the needs of the service." *Jackson v. United States, supra,* 551 F.2d at 284.

This finding is contrary to the express provisions of these documents. The "Statements for Enlistment" signed by Petitioner did not guarantee that a substantial portion of his enlistment would be spent in his initial enlistment option, and in fact provided that he could be transferred at any time *"other than as may be provided by the specific option selected."* DA Form 3286, Part I, Paragraph 1(f). However, the specific option selected by Petitioner and agreed to by the Army provided that upon completion of Basic Combat Training, Petitioner would "undergo AIT in military occupational specialty, . . . MECHANICAL MAINTENANCE." U.S. Army Special Unit Enlistment Option, DA Form 3286-47-R, Section I, Paragraph 1(c). See Appendix A. This document also provided that Petitioner was

> *guaranteed assignment to the unit for which enlisted for a minimum of 16 months.* Upon completion of the *guaranteed* period of stabilization in the unit for which enlisted, I may be reassigned in accordance with the needs of the Army. DA Form 3286-47-R, Section III, Paragraph 1(a). (Emphasis added.)

In addition to the profound errors of fact concerning Petitioner's contract with the Army, the Court of Claims made substantive findings concerning the authority of military recruiters, from which it concluded that Sergeant Kosik was not empowered to make the alleged promises or representations that

Petitioner would not be assigned to combat-type duties. This conclusion is unsupported by the record. In fact, had Petitioner been permitted to conduct discovery, he would have demonstrated the breadth of the recruiter's authority under Army regulations as well as his authority to commit the Army under the Guaranteed Enlistment Option Program, A.R. 610-201.[1]

These erroneous and improper findings of fact were the basis of the Court of Claims' determination that Petitioner's contract was ineffective and/or inapplicable to Petitioner's action against the United States. On the basis of this finding, the Court concluded that Petitioner's claim sounded not in contract but in tort, and was thus not within its jurisdiction. *Jackson v. United States, supra,* 551 F.2d at 285.

The magnitude of the error in these findings of fact, upon which the Court of Claims based its dismissal of Petitioner's action against the United States, requires review by this Court.

B. THE COURT OF CLAIMS ERRED IN FINDING THAT PETITIONER'S CASE SOUNDS IN TORT AND NOT IN CONTRACT.

The Court of Claims found that Petitioner's case sounded in tort and dismissed his Petition on the ground that it has no original tort jurisdiction. This finding and conclusion are in error. Petitioner's peti-

[1]This program has in various forms been in existence since World War II. The Army is bound by its own regulations. See *Billings v. Truesdell,* 321 U.S. 542 (1944); *Smith v. Resor,* 406 F.2d 141 (2d Cir. 1969).

tion to the Court of Claims, appended hereto as Appendix B, is based solely and exclusively on the breach of the enlistment contract. His petition contains *no* tort allegations, and it contains no elements or facts which could be read to constitute a tort. No instance of negligence has been suggested; no misrepresentation has been implied. Petitioner has alleged and would attempt to prove only a breach of contract, and not a tort.

The authorities cited in the Court of Claims opinion stand solely for the proposition that the Tucker Act, 28 U.S.C. §1491, does not confer jurisdiction upon the court in matters which are torts. Thus, in *Martilla v. United States,* 118 Ct. Cl. 177 (1950), the plaintiff complained of no breach of contract but rather an arm injury resulting from being called back to work before a fracture had healed. Similarly, in *Eastport Steamship Corp. v. United States,* 372 F.2d 1002 (Ct. Cl. 1967), *no breach* of contract was alleged, and the court found *no contract claim to exist.* Consequently, where the Maritime Commission wrongfully withheld permission to sell a vessel to a foreign purchaser, the action was held to be one sounding in tort, over which the Court of Claims had no jurisdiction. Nowhere does the court imply that a claim sounding in tort precludes contractual relief where appropriate.

Consistent with these cases is *Clark v. United States,* 461 F.2d 781 (Ct. Cl.), *cert. denied,* 409 U.S. 1028 (1972). There, although the plaintiffs, former members of the reserve component of the United States Air Force, *did* allege a breach of contract, the

court held that not only was there *no breach,* but also that there was *no contract.* Disposing of the contract claim on its merits, the court then held that it could give plaintiffs no relief on the claim which also sounded in tort, since the Tort Claims Act, 28 U.S.C. §2680, prohibited a suit *on* the tort. Obviously if there had been a legitimate contract claim the court would have entertained the suit regardless of the fact that the claim also sounded in tort. See *Kiefer & Kiefer v. Reconstruction Finance Corp.,* 306 U.S. 381, 395 (1939).

Nor is *Bibbs v. United States,* 206 Ct. Cl. 896, *cert. denied,* 423 U.S. 985 (1975), also cited by the court, to the contrary. The opinion in that case consists of a two-sentence order which states:

> Upon consideration thereof and of plaintiffs' response and of defendant's reply and of plaintiffs' response thereto, the court concludes that the motion should be granted because the action though pleaded in a contract form is an action sounding in tort over which this court has no jurisdiction under 28 U.S.C. §1491 (1970); *Martilla v. United States,* 118 Ct. Cl. 177 (1950); *Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 372 F.2d 1002 (1967); *Clark v. United States,* 198 Ct. Cl. 593, 461 F.2d 781, *cert. denied,* 409 U.S. 1028 (1972); and on the basis thereof,
>
> IT IS ORDERED that defendant's motion to dismiss is hereby granted and that plaintiffs' petition be and the same is hereby dismissed.

In *Bibbs,* the court merely held that the plaintiffs established no contractual basis for their claim and

that the only ground for their complaint was in tort, over which the court had no jurisdiction. The authority cited by the court as support for its holding substantiates this view. The cases, which are discussed above, all involve either non-contractual claims or claims which though pleaded in contractual terms were found not to be based on contracts. None of the cases involves a situation where a valid contractual relationship is in issue. Further, the Government's brief in *Bibbs* also argued that *no contract* existed, and this must be presumed to have been the basis for the court's holding.

Indeed, as the court in *United States v. Huff,* 165 F.2d 720, 725 (5th Cir. 1948), noted, it is an elementary and well-settled principle of law that:

> . . . [W]here the Government contracts through the agency of one authorized to contract for it, *the Government is liable for breach of that contract whether or not the damages sound in tort.* [Citations] *A tortious breach of contract is not a tort independent of contract so as to preclude an action under the Tucker Act.* "A party may in some cases waive a tort; that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements of both contract and tort. . . ." *Bigby v. United States,* 188 U.S. 400. . . . (Emphasis added.)

So, too, in *Chain Belt Co. v. United States,* 115 F. Supp. 701 (Ct. Cl. 1953), an action by a manufacturer against the Government for breach of contract arising out of the Government's failure to remove machinery from a portion of the plant purchased by the manu-

facturer and its failure to repair damage it caused, the court stated:

> While it is true that this court does not have jurisdiction over claims sounding in tort, *an action may be maintained in this court which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract.* 115 F. Supp. at 711-12. (Emphasis added.)

And in *Bird & Sons, Inc. v. United States,* 420 F.2d 1051 (Ct. Cl. 1970), the lessor of a truck sued the Government for breach of a lease resulting in damage to the truck. The court ruled that, "Where an alleged 'negligent' act constitutes a breach of a contractually created duty, the Tucker Act does not preclude relief." 420 F.2d at 1054.

Consequently, even if plaintiff had pleaded facts sufficient to constitute a claim in tort, which he has not, he would still be entitled to waive the tort and proceed under the Tucker Act. *Dooley v. United States,* 182 U.S. 222 (1901).

McCreery v. United States, 161 Ct. Cl. 484 (1963) and *Feres v. United States,* 340 U.S. 135 (1950), cited in the decision, are totally irrelevant to Petitioner's case. Those cases were based exclusively on the torts of negligence or misrepresentation and have nothing whatever to do with the contract claim which plaintiff brings herein. Similarly, in *Eastport Steamship Corp. v. United States, supra,* the court merely scrutinized the pleadings to determine what claim, if any, the plaintiff had, since no contract claim was

involved. The court did not indicate in any way that a legitimate contract claim is not cognizable because the claim "sounds in tort."

C. THE COURT OF CLAIMS ERRED IN FINDING THAT THE ARMY DID NOT BREACH ITS ENLISTMENT CONTRACT WITH PETITIONER.

In its opinion, the Court of Claims held that Petitioner was not entitled as matter of contractual right to the guaranteed enlistment option as delineated in his enlistment papers, and that Petitioner could not rely on any statements, representations or agreements made by the Army recruiter.

In attempting to create a volunteer Army, Congress enacted 10 U.S.C. §503, which requires that "the Secretary concerned shall conduct intensive recruiting campaigns to obtain enlistments in the Regular Army." Pursuant to 10 U.S.C. §3012, the Secretary of the Army authorized the so-called "guaranteed enlistment program." 32 C.F.R. §571.5.

One important inducement of this authorized campaign is the schooling or training provided under the guaranteed enlistment. A.R. 610-201. The document which Petitioner and the legal representative of the United States Army agreed to stated that Petitioner was "*assured* of attending school course" in mechanical maintenance. This assurance, and the assurance that Petitioner would be assigned to mechanical maintenance rather than to occupation specialties involving dangerous combat-type maneuvers, were the

consideration for, and conditions of, Petitioner's enlistment in the Army.

Common-law rules governing private contracts are applicable to agreements made with the Armed Forces. In *Peavy v. Warner,* 493 F.2d 748, 750 (5th Cir. 1974), a suit based on the breach of an enlistment contract was said to be entirely proper. The rule, as the court there pronounced it, is explicit:

> [C]laims that enlistment contracts are invalid or *have been breached are decided under traditional notions of contract law. Shelton v. Brunson,* 465 F.2d 144 (5th Cir. 1972); *Johnson v. Chafee,* 469 F.2d 1216 (9th Cir. 1972); *Chalfant v. Laird,* 420 F.2d 945 (9th Cir. 1969), 493 F.2d at 750. (Emphasis added.)

Applying these principles in the case at bar, the error of the Court of Claims' holding is apparent: Without the promise of specialized training in mechanical maintenance, Petitioner would not have signed the enlistment documents, the terms of which were later violated by the Army.

In addition, the Court of Claims' interpretation of A.R. 610-201 violates the long established standard for judging lawful military regulations. Army regulations have the force of law, *Cafeteria and Restaurant Workers Union Local 473 AFL-CIO v. McElroy,* 367 U.S. 886; *Billings v. Truesdell,* 321 U.S. 542 (1944); *United States v. Eliason,* 41 U.S. (16 Pet.) 291 (1842), and may not be questioned by the courts because they are thought to be unwise. *United States v. Eliason, supra.* In the case at bar, Petitioner would have demonstrated that under the applicable regulations, Sergeant Kosik was in fact empowered to make the promises and representations upon which Petitioner relied in enlisting, and that these promises and representations were binding on the Government.

A final point is in order. The United States has argued, and the Court of Claims has imputed, that Petitioner's and the Army's agreement to have Petitioner assigned to mechanical maintenance as opposed to occupation specialties involving dangerous combat-type maneuvers could form no basis for a contract, and none was thereby created. If this is so, Petitioner is rather hard pressed to know what it was that he signed. The document which he and the representative of the Army signed assured him of training in mechanical maintenance. Without this assurance, Petitioner would not have enlisted in the Army. Petitioner will not accept the imputation that the United States Army is not to be held to its promises. These are promises which the United States Army has circulated and presently circulates throughout this country to induce young people like Allen Jackson to join and make a career in this nation's volunteer military. Petitioner does not and will not believe that he was lied to. He will not believe that others are being deceived. He will not accept the suggestion that the promises of the United States are worthless and to be treated with contempt. Petitioner served his country honorably; he was mutilated while serving his country. He will not hear the Government say that the agreement he signed has no value, that the Government's words were empty, hollow and unenforceable in a court of law.

To hold that the United States Army is accountable on its contracts will neither imperil it nor the Republic. If the Government has no intention of living up to its word, it need not give its word. In times of national emergency, the Army may of course rely on the draft. It need make no promises; it need enter no bilateral agreements. Presently the nation is actively experimenting with a volunteer army, and so long as the Army feels required to promise young recruits specific military occupation specialties in order to encourage enlistment, it ought not to derive the recruiting advantages of its agreements but none of the burdens. Such an Army would be a trap for the unwary, a vessel for the gullible.

Petitioner rejects any suggestion that the agreement entered into between the parties would operate to restrict all basic duties of the plaintiff as a soldier, and that to affirm the agreement would mean that Petitioner might be in continuous attendance at an Army school course in automobile maintenance for the term of his enlistment. Such a contention, which the Government has advanced below, is absurd and insulting. The Army promised only to send Petitioner to mechanical maintenance school after his basic training. The natural consequence of being so trained would be assignment to a Military Occupation Specialty for which the training is appropriate. That was the expectation of the parties—not that Petitioner would spend his career in training.

Petitioner entered into an enforceable contract with the United States Army, which the Army breached.

The conclusion to the contrary drawn by the Court of Claims is unsupported, inexplicable and clearly erroneous.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MELVIN M. BELLI,
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722 Montgomery Street,
San Francisco, California 94111,
Attorneys for Petitioner.

Dated, August 17, 1977.

(Appendices Follow)

APPENDICES

Appendix A

DA Form 3286-32-R, 1 Jun 72

STATEMENT FOR ENLISTMENT DELAYED ENTRY PROGRAM

For use of this form, see AR 601-220; The proponent agency is the Office of the Deputy Chief of Staff for Personnel

TO BE COMPLETED BY ALL APPLICANTS ENLISTING FOR THIS OPTION

1. ACKNOWLEDGEMENT: In connection with my enlistment in the United States Army Reserve, I hereby acknowledge that:

a. My enlistment in the US Army Reserve obligates me to a total of 6 years of service in the Armed Forces of the United States, including service in the Reserve Components, unless sooner discharged by proper authority.

b. I will be assigned to the US Army Reserve Control Group (Delayed Entry), during which time I will be in a nonpay status, and will not be authorized to participate in any Reserve training.

c. My time served in the Reserve will be creditable for pay purposes when I enlist in the Regular Army or enter on active duty.

d. The combined time served in the Reserve prior to entry on active duty and on active duty will be creditable to my 6-year obligation.

e. I volunteer to serve on active duty for 3 (enter number) years in any job assignment specified by the

Army, such period to begin within 180 days unless I enlist in the Regular Army, or I am granted further delay by proper authority.

f. This enlistment in no way releases me from my obligation to register with the Selective Service System; however, by fulfilling the terms of this agreement, I will be deferred from induction or involuntary order to active duty except in the event of war or national emergency declared by Congress, or national emergency declared after 1 Jan 53 by the President of the United States or as otherwise provided by law presently in force or hereafter enacted.

g. In lieu of performing the active duty specified in e above, I may enlist in the Regular Army for not less than ..... (enter number) years with the following understanding:

(1) Upon enlistment in the Regular Army, I will be enlisted under the provisions of AR 601-210, TABLE 5-41 (Enter the appropriate table number and the title of the enlistment option(s) for which enlisting. Only tables for which a "yes" entry is included in Column 7, Table 5-1, may be entered here.)

(2) If enlisting for an Army school course, I am assured of attending school course 1st INF DIV (M) Ft. Riley, Ks and OJT MOS 63A10 (MECHANICAL MAINT) (Enter school course title and course number.)

(3) If I subsequently enlist in the Regular Army for an option for which an enlistment bonus is authorized, has been authorized in the past, or may be

authorized in the future, I will be entitled to the bonus only if it is authorized at the time of my enlistment in the Regular Army.

(4) In the event the enlistment option, school course, or training for which enlisting is discontinued before I enlist in the Regular Army, I will enlist for another option, school course, or training of my choice for which I am qualified and for which there is a vacancy.

(5) The date of my enlistment in the Regular Army is scheduled for 25 (Day) FEB. (Month) 74. (Year)

(6) Should I disqualify myself before I enlist in the Regular Army, initiate action designed to obtain my release from the Delayed Entry Program, fail to enlist in the Regular Army, or willfully fail to report for active duty on the date specified in my enlistment orders, I forfeit my entitlement to this enlistment option and may be required to serve on active duty for 3 (enter number) years in my Reserve status.

h. If for any reason I am discharged from the Army Reserve other than for immediate enlistment for not less than 3 (enter number) years in the Regular Army, my draft-deferred status is terminated and the circumstances will be reported to my local Selective Service Board.

i. Upon completion of my active duty, I will serve in the Ready Reserve in accordance with laws and regulations then in effect or thereafter put into effect.

j. In the event I willfully fail to report on the date specified in my active duty orders to the Armed

Forces Examining and Entrance Station designated therein, I will be in an absent without leave (AWOL) status and subject to apprehension and disciplinary action under Article 85 (Desertion) or Article 86 (AWOL) of the Uniform Code of Military Justice (Title 10, US code, Sections 885 and 886).

2. UNDERSTANDING: I have read and understand each of the statements above and the statements contained in DA Form 3286, signed by me, and understand that they are intended to constitute all promises whatsoever concerning my enlistment in the US Army Reserve. Any other promise, representation, or commitment made to me in connection with my enlistment is written below in my own handwriting or is hereby waived (if none, write "None"). None

AUTHENTICATION

Signature of Career Counselor

/s/ Anthony C. Kosik

Signature of Applicant

/s/ Allen A. Jackson

Date 24 Jan 1974

Typed Name, Grade, SSN, and Signature or Witnessing Officer

Stephen H. Buch
Capt. AGC
Proc Off.

DA Form 3286-47-R, 1 Dec 73

PART VI—UNITED STATES ARMY SPECIAL UNIT ENLISTMENT OPTION

For use of this form, see AR 601-210; the proponent agency is the Office of the Deputy Chief of Staff for Personnel.

TO BE COMPLETED BY ALL APPLICANTS ENLISTING FOR THIS OPTION

SECTION I

(Applicable to all nonprior service applicants and prior service applicants who are required to undergo advanced individual training.)

1. ACKNOWLEDGEMENT: In connection with my enlistment in the Regular Army for the United States Army Special Unit Enlistment Option, I hereby acknowledge that:

a. My enlistment for this option assures me that, provided I meet required prerequisites, I will be assigned to 1st INF DIV, FT. RILEY, KS (Enter the unit for which enlisting.)

b. Unless I have previously completed basic or basic combat training (BCT) and served in the Army or Marine Corps in the past 3 years, I must complete BCT prior to undergoing advanced individual training (AIT).

c. Upon completion of BCT, I will undergo AIT in military occupational specialty MOS (OJT) 63A10 MECHANICAL MAINTENANCE (Enter the MOS for which enlisted.)

d. In the event the training in the MOS for which I enlisted is cancelled after my enlistment or if I fail to report for MOS training at the appropriate time, through no fault of my own, I may select training in any other MOS for which a vacancy exists in the unit for which enlisted and for which I am qualified.

SECTION II (Deleted)

SECTION III

(Applicable to all applicants.)

1. ACKNOWLEDGEMENT: In connection with my enlistment in the Regular Army for the United States Army Special Unit Enlistment Option, I hereby acknowledge that:

a. I am guaranteed assignment to the unit for which enlisted for a minimum of 16 months or normal tour length if enlisting for a short tour area after arrival at the unit for which enlisted, except as indicated below. Upon completion of the guaranteed period of stabilization in the unit for which enlisted, I may be reassigned in accordance with the needs of the Army.

b. If enlisting for the United States Army Air Defense Command, I will be assigned to a unit located in the vicinity of NA (Enter the selected metropolitan area; e.g., "Chicago, IL.")

c. If enlisting for an airborne or Special Forces Unit, I must complete airborne training.

d. In the event the unit or activity to which I am assigned or attached under the provisions of this op-

tion is deployed, relocated, inactivated, disbanded, discontinued, reorganized, or redesignated prior to the expiration of the guaranteed minimum period of assignment to the unit, activity, installation, or oversea area of choice, I will remain assigned to the unit or area, or be reassigned in accordance with my preferences. However, If the foregoing is not possible or does not fulfill Army worldwide personnel requirements, the needs of the Army will determine whether I will remain assigned to the unit or area or be reassigned.

e. If enlisting for assignment to an oversea command, I must be eligible under the provisions of AR 614-30, for oversea assignment.

f. In the event I fail to meet any of the established prerequisites for this option or become medically or otherwise disqualified for training or duty in my designated military occupational specialty (MOS), I will be trained and utilized in accordance with the needs of the Army and will be required to complete the term of service for which I enlisted.

g. My term of enlistment is for 3 years.

2. UNDERSTANDING: I have read and understand each of the statements above and the statements contained in other parts of DA Form 3286, signed by me, and understand that they are intended to constitute all promises whatsoever concerning my enlistment. Any other promise, representation, or commitment made to me in connection with my enlistment is written below in my own handwriting, or is hereby waived. (If none, write "None.") X None.

AUTHENTICATION

Signature of Career Counselor

/s/ Anthony C. Kosik

Signature of Applicant

/s/ Allen A. Jackson

Date 25 FEB 1974

Typed Name, Grade, SSN, and Signature of Witnessing Officer

/s/ J. P. Woythal
Jeffrey P. Woythal
1st Lt. INF
Asst Proc Off AFEES
CHCO

*U.S. Government Printing Office: 1973—750-269/1807 Region 5-1

STATEMENTS FOR ENLISTMENT *(Parts I through V)*

For use of this Form, see AR 601-210 and AR 601-280; the proponent agency is Office of the Deputy Chief of Staff for Personnel.

PART I—GENERAL STATEMENT OF UNDERSTANDING

(To be completed by all applicants for enlistment or reenlistment in the Regular Army)

1. In connection with my enlistment in the Regular Army, I hereby acknowledge that:

LINE	ACKNOWLEDGEMENT
a	All promises made to me are contained in Items 3 *(Rate/Grade)*, 37 *(Rate/Grade Appointed/Reappointed)*, 48 *(Untitled Item)* of the DD Form 4, my Enlistment Contract.
b	I have not been guaranteed Technical School Training unless the title of the school course has been entered in Item 48, DD Form 4.
c	Should I make any material omission or misstatement of fact in connection with any of my enlistment documents: (1) I may be subject to early separation from this enlistment or, (2) I will complete, if permitted, the period for which I enlisted in any assignment deemed appropriate in accordance with the needs of the Army.
d	Should I choose an option which requires a security clearance and I am not granted such clearance after I have enlisted, or my granted clearance is revoked after I have enlisted, I agree to accept any assignment in accordance with the needs of the Army and I will complete the period for which I enlisted.
e	Law violations for which I have been convicted or have had adverse adjudications as a juvenile or youthful offender may be cause for denial of security clearance.

My choice of initial enlistment option shown in Item 48 of my DD Form 4 does not constitute any guarantee that a substantial part of my enlistment will be served in this option, and the
f needs of the service may result in my transfer at any time *(other than as may be provided by the specific option selected)* to any other assignment within the continental United States or to an oversea command.

Should my enlistment involve a commitment for specialized training or a selective assignment, conduct on my part occurring
g after my enlistment which results in disciplinary action may be just cause for my transfer to any other assignment within the continental United States or to an oversea command.

My acceptance for enlistment carries no promise whatsoever
h relative to furnishing transportation for dependents to oversea commands or to the furnishing of family quarters either in oversea commands or in the continental United States.

If, after my enlistment for a specific option, I should fail to meet required qualifications which cannot be determined prior
i to my enlistment, I understand that I will not be offered another enlistment option, but will be trained and assigned in accordance with the needs of the Army and will be required to complete the term of service for which I enlisted.

If, after my enlistment in the Regular Army, I should waive my
j initial enlistment option as listed in Item 48, DD Form 4 and in Part VI of my statements for enlistment for any reason whatsoever, this initial option will not be reinstated at a later date.

I am not conscientiously opposed, by reason of religious train-
k ing or belief, to bearing arms or to participation in, or training for war in any form.

I am aware that in the event of armed conflict involving the United States the Secretary of the Army may declare null and
l void any portion of my enlistment option pertaining to training, assignment, or duty, if he determines such action to be necessary.

PART II—STATEMENT OF LAW VIOLATIONS AND PREVIOUS CONDITIONS

(To be completed by every individual enlisting or reenlisting in the Regular Army or amending a Regular Army enlistment contract)

2. INSTRUCTIONS TO APPLICANT

(Read before completing Part II)

a. Complete the statement in Item (1) below by checking the appropriate box.

b. Answer questions (2) through (6) by writing "Yes" or "No" as appropriate, in the "Answer" column.

c. This statement is to be a complete and accurate list of all law violations and offenses *(including minor traffic violations or offenses)* for which you have been arrested, cited, charged, or held *(regardless of subsequent disposition of your case)* by civil law enforcement officials, or for which you were referred to juvenile court or juvenile probation officials.

d. Prior Army service personnel list only those violations occurring during and/or subsequent to last period of honorable active service, except for offenses not previously revealed.

e. Inservice personnel immediately enlisting, list only those violations occurring during current term of service, except for offenses not previously revealed.

NUMBER		ANSWER
(1)	I have read or had explained to me paragraphs 14 and 19, AR 604-10 which sets forth the criteria (reasons) for discharge and types of discharge and certify that I ☐ have ☒ have not (check one) engaged in disloyal or subversive activities as defined therein.	No
(2)	Have you ever been rejected for enlistment or induction in any of the Armed Forces to include failure of the mental examinations administered by any AFEES, or been discharged from previous service under other than honorable conditions, under Personnel Security Regulations, or by reason of unsuitability, or undesirable habits or traits of character, or for medical reasons?	No

NUMBER		ANSWER
(3)	Have you ever been arrested, cited, charged or held by Federal, State, County, City or other law enforcement authorities or by Juvenile Court or Juvenile Probation Officials for any violation of any Federal Law, State Law, County or Municipal Law, Regulation or Ordinance?	No
(4)	Have you ever been convicted of a felony or any other offense, or adjudicated a youthful or juvenile delinquent?	No
(5)	Have you ever been imprisoned under sentence of any court?	No
(6)	Are you now or have you ever been on parole, probation supervision, under suspended sentence, or are you awaiting final action on charges against you?	No

PART II—STATEMENT OF LAW VIOLATIONS AND PREVIOUS CONDITIONS *(Continued)*

3. Remarks *(Give full details for any of the above questions to which you answered yes.) (If additional space is required, continue this item on a separate sheet of paper and attach securely to this form.)*

REF ITEM	OFFENSE(S)	DATE AND PLACE	DISPOSITION
		DEVON KEDZE	CHARGES
# 3	SPEEDING	Feb 21 - 1974	DROPPED

PART III—ACKNOWLEDGEMENT OF UNDERSTANDING OF SERVICE REQUIREMENTS

(Applicable to all male applicants who incur a military service obligation under current laws)

4. I understand that upon completion of my period of enlistment in the Regular Army, I will become a Reserve of the Army. Being a Reserve of the Army, if I enlist in a federally recognized unit of the Army National Guard, I will become an enlisted member of the Army National Guard of the United States. I understand further that satisfactory service as an enlisted member of the Army National Guard of the United States constitutes service in the Ready Reserve. Accordingly, if Ready Reserve service in an appropriate activity of the United States Army Reserve is not available to me, I agree to enlist in the Army National Guard of a state *(including the District of Columbia and Puerto Rico)* in which I am residing, if so directed. If my enlistment is accepted by proper authority I agree to complete my Ready Reserve service as a member of the Army National Guard of the United States.

PART IV—DEPENDENCY STATEMENT

(To be completed by all applicants)

5. Relationship and age of all persons who are dependent upon me for support are recorded below *(If none, so state):*

RELATIONSHIP	AGE
None	

PART V—MARRIAGE STATEMENT *(Item 6 is applicable to WOMEN applicants. Item 7 to be completed by ALL applicants (men & women))*

6. I understand that at my request I may be separated from the Women's Army Corps by reason of marriage after satisfying service commitments on my current enlistment which were incurred by school attendance or by promotion, or upon completion of 18 months of my current enlistment, whichever is later. If I am eligible for separation on marriage and my application is not submitted before I depart my home station for an oversea assignment, I must serve at least six months of that tour before I can be separated. If I am serving in an oversea command and I am eligible for separation by reason of marriage, I must serve at least six months of that tour before I can be separated. I understand also that in time of war or national emergency declared by Congress I will not be eligible to be discharged solely for reason of marriage. I further understand that withholding knowledge of pregnancy, parenthood, or marriage will constitute grounds for my being discharged from the United States Army.

7. Complete one of the following statements by entering "X" in applicable box(es) and recording date(s) where appropriate.

☒ NEVER MARRIED ☐ MARRIED ☐ WIDOWED _____ *(Date)*

☐ DIVORCED _____ *(Date)* ☐ LEGALLY SEPARATED _____ *(Date)*

I have read and understand the meaning of all statements contained in Parts I through V of this form and agree to all conditions set forth therein. I certify that all answers to questions, statements and entries on this form are true, correct and complete and that the Recruiter/Career Counselor has informed me that should I intentionally conceal any information required above, I may later be subject to disciplinary action or discharge upon its discovery. I explicitly understand that Part III—Acknowledgement of Understanding of Service Requirements applies to me, if I have not previously discharged my lawful military service obligation.

DATE	SIGNATURE OF APPLICANT	SIGNATURE AND TITLE OF WITNESS
1 1974	/s/ Allen Aaron Jackson	SSG /s/ James F. Barney

3C

Appendix B

Belli, Ashe & Choulos
Melvin M. Belli
James M. Garlock
722 Montgomery Street
San Francisco, CA 94111
Telephone 415-981-1849
Attorneys for Plaintiff

In the United States Court of Claims

No. 259-76

Allen Aaron Jackson, Plaintiff,

vs.

United States of America, Defendant.

VERIFIED PETITION

Now comes the plaintiff, Allen Aaron Jackson, by and through his attorneys Belli, Ashe & Choulos and complaining of the defendant, The United States, as follows:

I

That the plaintiff is a United States citizen,

II

This suit is brought under 28 USC §1491 as amended which provides that the Court of Claims

shall have jurisdiction to render judgment upon any claim against the United States founded upon any express or implied contract with the United States.

III

That at all times referred to herein, the United States was acting through the United States Army and its officers and agents, including one Sgt. A. C. Kosik, an officer in the Army of the United States.

IV

That on or about January 24, 1974 the plaintiff entered into a contract of enlistment in the Army for three years with Sgt. A. C. Kosik representing the United States Army.

V

That the plaintiff and Sgt. A. C. Kosik specifically agreed that the plaintiff would be assigned to automobile maintenance after basic training. The promise was written and embodied in "Statements For Enlistment, Delayed Entry Program," at g(2): "I am assured of attending school court 1st Inf. Div (M) Ft. Riley, Ks., (mechanical maint.)" A copy of said contract is attached as Exhibit A and incorporated herein. [See Appendix A hereto.]

VI

That as a condition to plaintiff's enlistment, he and Sgt. A. C. Kosik agreed that plaintiff did not want regular assignment to any dangerous-combative-type military maneuvers or functions as he feared for his bodily safety and well-being.

VII

That on or about May 11, 1974, plaintiff arrived for regular duty at Fort Riley, Kansas, and was assigned to Tank Division.

VIII

That Plaintiff protested his assignment to tank duty claiming a violation of the spirit and terms of his enlistment contract with the United States. On being told of the Plaintiff's dissatisfaction with the breach of the United States, Lt. Goulding, Fort Sheridan agreed that the plaintiff was definitely improperly assigned and that there was clearly a breach of the enlistment contract Plaintiff and the United States had entered.

IX

That on or about May 20, 1974, Plaintiff was scheduled to meet with M. Dane, of the Army, to effect Plaintiff's transfer to automobile mechanics. This appointment was cancelled by the commander of the tank unit because maneuvers scheduled for that day were "more important."

X

That on or about May 20, 1974, the tank unit at Ft. Riley, to which Plaintiff was erroneously assigned, commenced dangerous combatant type maneuvers whereby two sets of four tanks would attack each other. The Plaintiff in full combatant field gear was required to run eight-hundred yards in front of his tank unit and explode smoke grenades at a certain point on the road. The Plaintiff performed as or-

dered and, when the tanks reached the detonated grenades they turned in the Plaintiff's direction and ran over him, causing him to have the lower half of his body, from the navel down, amputated.

XI

That the Plaintiff has duly performed all the terms and conditions of the said agreement on his part to be performed.

XII

That the United States by and through the United States Army, has breached the terms of its contract with the Plaintiff.

XIII

That the injury and damage which occurred to the Plaintiff was a direct consequence of the breach of contract by the United States. That the Plaintiff, Allen Aaron Jackson, has been damaged in the amount of Five Million ($5,000,000.00) Dollars.

WHEREFORE, the Plaintiff, Allen Aaron Jackson, prays judgment against the defendant, the United States, in the amount of Five Million ($5,000,000.00) Dollars.

Dated: June 23, 1976

Belli, Ashe & Choulos
By /s/ James M. Garlock
James M. Garlock
Attorneys for Plaintiff

VERIFICATION

Allen Aaron Jackson, being first duly sworn upon his oath deposes and says:

He is the Plaintiff in the above matter, he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

/s/ Allen Aaron Jackson
Allen Aaron Jackson

Subscribed and sworn to before me on the 16th day of February, 1976.

/s/ Gerri Rudman
Notary Public

Appendix C

In the United States Court of Claims

No. 259-76

(Decided March 23, 1977)

ALLEN AARON JACKSON v. THE UNITED STATES

James M. Garlock, attorney of record for plaintiff. *Belli & Choulos* and *Melvin M. Belli,* of counsel.

LeRoy Southmayd, Jr., with whom was *Acting Assistant Attorney General Irving Jaffe,* for defendant.

Before SKELTON, KUNZIG and BENNETT, *Judges.*

ON DEFENDANT'S MOTION TO DISMISS

SKELTON, *Judge,* delivered the opinion of the court:

The plaintiff enlisted in the United States Army on February 25, 1974, for a term of three years by signing written documents of enlistment, which are discussed below. He alleges that the recruiting officer agreed with him that plaintiff would be allowed to attend an automotive mechanical maintenance school of the 1st Inf. Div. (M) at Fort Riley, Kansas, and that plaintiff would not be assigned to any dangerous-combative-type military maneuvers or functions. He reported for duty at Fort Riley, Kansas, on May 11, 1974, and was assigned to a tank division. On May

20, 1974, he was required to engage in dangerous combatant type maneuvers with his tank unit and during the maneuvers one of the tanks ran over the plaintiff, causing him to have the lower half of his body, from the navel down, amputated. Plaintiff argues that because of the foregoing, the Army breached the enlistment contract, and he sues here to recover $5,000,000 for such breach. The plaintiff is totally disabled and has been receiving total disability benefits in Grade PV2 since May 29, 1974.

The case is before us on defendant's motion to dismiss the plaintiff's petition. The defendant says that although plaintiff has couched his suit in terms of a contract action, his claim sounds in tort over which this court has no jurisdiction. Also, the defendant alleges that the enlistment documents signed by the plaintiff, copies of which are attached to defendant's reply brief, nowhere contain any provision that the plaintiff would not be assigned to any dangerous-combative-type military maneuvers or functions, and that if any such agreement was made orally by the recruiting officer, it was done without authority and contradicts the written enlistment documents and was and is null and void.

The Department of the Army records disclose that on February 25, 1974, plaintiff began his active duty service at the Chicago Armed Forces Entrance and Examination Station (AFEES). While at the station, plaintiff executed (1) Department of Defense Form 4 (DD 4), Enlistment Contract-Armed Forces of the United States; (2) Department of the Army Form

3286 (DA 3286), Statements for Enlistment, Parts I through V; and (3) Department of the Army Form 3286-47-R, Statements for Enlistment, Part VI.

In executing DA Form 3286, plaintiff acknowledged in Part 1, General Statement of Understanding, that "All promises made to me are contained in Items 3 (Rate/Grade), 37 (Rate/Grade Appointed/Reappointed), 48 (Untitled Item) of the DD Form 4, my Enlistment Contract." In the DD 4 executed by plaintiff, Items 3, 37 and 48 state in sequential order: "PVIE-1," "NA," "ENL FOR SUE ENL OPT (TABLE 5-41) 1ST INF DIV, FT RILEY, KS AND MOS 63A10 MECH MAINT." There were no promises made in the documents pertaining to service with any dangerous-combative-type military maneuvers or functions of the U. S. Army.

Also, DA Form 3286 contained the following provision:

f. My choice of initial enlistment option shown in Item 48 of my DD Form 4 does not constitute any guarantee that a substantial part of my enlistment will be served in this option, and the needs of the service may result in my transfer at any time (other than as may be provided by the specific option selected) to any other assignment within the continental United States or to an oversea command.

Part VI of DA Form 3286-47-R specified:

b. Unless I have previously completed basic or basic combat training (BCT) and served in the Army or Marine Corps in the past 3 years, I must complete BCT prior to undergoing advanced individual training (AIT).

c. Upon completion of BCT, I will undergo AIT in military occupational specialty MOS (OJT) 63A10 MECHANICAL MAINTENANCE (Enter the MOS for which enlisted).

In executing DA Form 3286-47-R, plaintiff acknowledged that no other promises, representations, or commitments had been made to him other than as to the statements set forth in this document, by writing in the word "None," as shown as follows:

2. UNDERSTANDING: I have read and understand each of the statements above and the statements contained in other parts of DA Form 3286, signed by me, and understand that they are intended to constitute all promises whatsoever concerning my enlistment. Any other promise, representation, or commitment made to me in connection with my enlistment is written below in my own handwriting, or is hereby waived. (If none, write "None.")

X None

It is clear from the above enlistment documents the plaintiff signed that:

(1) Before the plaintiff could take the mechanical maintenance course he had to complete basic combat training. It is apparent that plaintiff had not complied with this requirement, as he had only been at Ft. Riley nine days when he was injured and obviously was engaged in basic combat training at the time of his injury. The plaintiff agrees that this is true.

(2) The plaintiff could be placed in any assignment at any time according to the needs of the service.

(3) The plaintiff stated in his own handwriting that no promises had been made to him in connection with his enlistment other than those contained in the enlistment documents he had signed, which are discussed in detail above.

(4) No promise, representation, commitment, agreement, or contract was made between the Army and the plaintiff in the enlistment documents in connection with his enlistment that provided that he would not be assigned to any dangerous-combative-type military maneuvers or functions during his service in the Army. It is clear that the documents, *supra*, executed by plaintiff upon entering active duty service in the Army, imposed no obligation on the United States to refrain from having plaintiff participate in a field training exercise, nor was there any prohibition from utilizing plaintiff in field training exercises.

Notwithstanding plaintiff's positive statement in the enlistment documents that no promises or representations were made to him other than those in the written documents, he now claims that he was promised by the recruiting officer that he would not be assigned to dangerous or combat-type military duties. He does not state whether such promises were oral or written, but since they are not in the written enlistment papers, he evidently contends that the representations and promises were made orally by the

recruiting officer. If this is true, such oral promises and representations, if they were made by the recruiting officer, are not binding on the government. In *Goldstein v. Clifford,* 290 F.Supp. 275 (D.N.J. 1968), it was held:

> The enlistment instrument and the statutory law in effect when it was signed constitute the enlistment contract. * * * [*Id.* at 279]

See also United States ex rel. Norris v. Norman, 296 F.Supp. 1270 (N.D. Ill. 1969) and *Pfile v. Corcoran,* 287 F.Supp. 554 (D. Colo. 1968). In our opinion, 10 U.S.C. § 505 requires written instruments for an enlistment. Otherwise, there would be no way the government could determine which branch of the service was involved nor the term or conditions of the enlistment.

Even if the Army recruiter made the alleged oral promises to the plaintiff, which defendant denies, plaintiff cannot recover on his contract theory unless he shows that the recruiter had the actual authority to make the statements on which plaintiff says he relied. *Housing Corp. of America v. United States,* 199 Ct. Cl. 705, 468 F.2d 922 (1972); *Operational Manuals, Inc. v. United States,* 205 Ct. Cl. 854 (1974). One who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with the actual authority to enter the contract alleged. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947); *Haight v. United States,* 209 Ct. Cl. 698 (1976), *cert. denied,* 429 U.S.—(45 U.S. L.W. 3251 (October 4, 1976)). Moreover, the United

States is not estopped to deny the authority of its agents. *California-Pacific Util. Co. v. United States,* 194 Ct. Cl. 703, 720 (1971); *Putnam Mills Corp. v. United States,* 202 Ct. Cl. 1, 479 F.2d 1334 (1973). The plaintiff has not proven that the recruiter had actual authority to make the alleged oral promises or representations, if he did in fact make them. It is well settled that the United States is not bound by its agents acting beyond their authority and contrary to regulation. *Federal Crop Ins. Corp. v. Merrill, supra; Porter v. United States,* 204 Ct. Cl. 355, 496 F.2d 583 (1974), *cert. denied,* 420 U.S. 1004 (1975); *Operational Manuals, Inc. v. United States, supra.* In the present state of the record, the court is required to conclude that the recruiter did not make the alleged promises and representations, or, if he did make them, he had no authority to do so. In either case, the plaintiff has no claim for damages for breach of contract.

After a thorough, careful, and comprehensive review of the facts in this case by the court in view of the shocking severity of the plaintiff's injuries, we conclude that although plaintiff attempts to cast his complaint in terms of breach of an enlistment contract, the action sounds in tort. This court, pursuant to 28 U.S.C. § 1491, has no original tort jurisdiction. *Martilla v. United States,* 118 Ct. Cl. 177 (1950); *Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 372 F.2d 1002 (1967); *Clark v. United States,* 198 Ct. Cl. 593, 461 F.2d 781, *cert. denied,* 409 U.S. 1028 (1972); *Bibbs v. United States,* 206 Ct. Cl. 896, *cert. denied,* 423 U.S. 985 (1975).

In *McCreery v. United States,* 161 Ct. Cl. 484, 487-88 (1963), this court stated:

> The claim here is based on misrepresentation by the defendant's officers which the plaintiff relied on to his detriment. The claim thus sounds in tort. *Restatement of Torts* (1938) § 532; Prosser *Torts* (1941 ed.) § 87. See also *United States v. Neustadt,* 366 U.S. 696, 706, fn. 16 (1961). Repeatedly it has has been held that under the Tucker Act (28 U.S.C. § 1491), which defines the general trial jurisdiction of this court, this court lacks jurisdiction over a case sounding in tort regardless of how vicious or malicious the tort may be. * * * [Footnote omitted.]

The case of *Bibbs v. United States, supra,* is very much in point. In that case we held:

> * * * Upon consideration thereof and of plaintiffs' response and of defendant's reply and of plaintiffs' response thereto, the court concludes that the motion should be granted because the action though pleaded in a contract form is an action sounding in tort over which this court has no jurisdiction under 28 U.S.C. § 1491 (1970); *Martilla v. United States,* 118 Ct. Cl. 177 (1950); *Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 372 F.2d 1002 (1967); *Clark v. United States,* 198 Ct. Cl. 593, 461 F.2d 781, *cert. denied,* 409 U.S. 1028 (1972); and on the basis thereof,
>
> IT IS ORDERED that defendant's motion to dismiss is hereby granted and that plaintiffs' petition be and the same is hereby dismissed. [206 Ct. Cl. at 897.]

If plaintiff's claim is based on the act or omission of the recruiting officer, an employee of the govern-

ment, it would be excluded from coverage under the Tort Claims Act, 28 U.S.C. § 2680(a); *Clark v. United States, supra.* Furthermore, under 28 U.S.C. § 2401(b), a tort claim against the United States is barred two years after such claim accrues. This time period has expired in the instant case. Accordingly, no purpose would be served by transferring the instant case, under 28 U.S.C. § 1506, to the appropriate district court which has tort claims jurisdiction for proceedings under the Federal Tort Claims Act. Even if the limitation question were not involved and the case could be transferred to an appropriate district court, the plaintiff would be confronted with the decision of the Supreme Court in *Feres v. United States,* 340 U.S. 135 (1950) involving an Army lieutenant who was killed in a fire in an Army barracks, in which the court stated at 141:

> * * * We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. * * * [Footnote omitted.]

The court deeply sympathizes with the plaintiff for the severe injuries he received while serving our country in the United States Army. However, the court is without jurisdiction, authority, or power to grant him any relief. It may be that he could get help from Congress by way of a Congressional Reference case, but that is for him to decide.[1]

---

[1]J. Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective,* 25 Am. U. L. Rev. 595 (1976).

We hold that plaintiff's case sounds in tort and not in contract, and that we have no jurisdiction of his case. See 28 U.S.C. § 1491 and cases cited above.

The defendant's motion to dismiss is granted and plaintiff's petition is dismissed.

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

No. 77-277

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALLEN AARON JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-277

ALLEN AARON JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

Petitioner, who was injured while performing military service, seeks review of a decision of the Court of Claims dismissing his action for damages for failure to establish a breach of contract.

On January 24, 1974, petitioner signed an enlistment contract that obligated him to serve three years in the United States Army (Pet. App. A, pp. i-iv). Petitioner began his active duty service on February 25, 1974, at which time he executed a number of additional documents, including DA Form 3286-47-R, the Special Unit Enlistment Option (Pet. App. A, p. v), which provided in Part VI, Sec. I, Paragraph 1(c), that: "Upon completion of BCT [basic combat training], I will undergo AIT [advanced individual training] in military occupational specialty * * * Mechanical Maintenance * * *." Petitioner's enlistment option assured him that he would

be assigned to his chosen unit for at least 16 months. DA Form 3286-47-R, Part VI, Sec. III, Paragraph 1(a) (Pet. App. A, p. vi). The enlistment contract, however, did not guarantee that petitioner would serve only in the mechanical maintenance specialty. Part I of DA Form 3286-47-R, Paragraph 1(f), provided (Pet. App. A, pp. ix-x; emphasis added) that:

> In connection with my enlistment in the Regular Army, I hereby acknowledge that:
>
> * * * * *
>
> (f) My choice of initial enlistment option * * * does not constitute any guarantee that a substantial part of my enlistment will be served in this option, and the needs of the service may result in my transfer *at any time* (other than as may be provided by the specific option selected) to any other assignment * * *.

When petitioner completed his basic training, he was initially transferred to a tank division at Fort Riley, Kansas. Nine days later, on May 20, 1974, while participating in combat maneuvers, petitioner suffered the injuries that have given rise to this lawsuit (Pet. App. B, p. xvii).

Petitioner instituted this action in the Court of Claims, alleging that his assignment to a tank division constituted a breach of his enlistment contract and that the injuries he suffered in training were a result of that breach (Pet. App. B, p. xvii). The Court of Claims held that there had been no breach of the enlistment contract and that petitioner's action therefore sounded in tort. The case was dismissed pursuant to 28 U.S.C. 1491, which provides that the Court of Claims has no original tort jurisdiction (Pet. App. C, p. xxix).

1. Petitioner contends that he was guaranteed that at no time in his military career would he ever be required

to engage in dangerous combat-type maneuvers (Pet. 13). The Court of Claims correctly concluded that this contention is inconsistent with the plain language of petitioner's enlistment agreement. While the agreement insured that petitioner would spend at least 16 months of his military career in the infantry division at Fort Riley, Kansas (Pet. App. A, pp. v-vi), the contract did not provide that petitioner never would be assigned to dangerous combat-type maneuvers during his military career. To the contrary, the enlistment agreement explicityly provided for transfer "to any other assignment" (Pet. App. A, p. x).

Petitioner contends (Pet. 15) that he relied on oral assurances by the Army recruiter that he would not be given combat-type assignments, but the specific language of the enlistment agreement provides (Pet. App. A, p. vii; emphasis added):

> I have read and understand each of the statements above and the statements contained in other parts of DA Form 3286, signed by me, and understand that they are intended to constitute all promises whatsoever concerning my enlistment. *Any other promise, representation, or commitment made to me in connection with my enlistment is written below in my own handwriting, or is hereby waived* (If none, write "None.").

In the space below this provision, petitioner wrote "none" (Pet. App. C, p. xxiii). This waiver belies petitioner's claim of having relied upon a recruiter's representation.[1]

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[1]In any case, a recruiter's alleged promise could not alter the written agreement. The recruiter was not authorized to promise exclusively noncombat-type activities, and the United States cannot be bound by acts of its agents that are beyond their authority. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380. The Court of Claims therefore correctly concluded that the enlistment agreement "imposed no obligation on the United States to refrain from having plaintiff participate in a field training exercise" (Pet. App. C, p. xxiv).

2. Petitioner also claims (Pet. 6-7) that the enlistment agreement required the Army to assign him to training in his chosen specialty of mechanical maintenance immediately upon completion of his basic training. Petitioner relies upon DA Form 3286-47-R, Part VI, Sec. I, Paragraph I(c), providing that: "[u]pon completion of BCT [basic combat training], I will undergo AIT [advanced individual training] in military occupational specialty * * * Mechanical Maintenance * * *" (Pet. App. A, p. v).

The Court of Claims did not interpret this language. The court apparently was operating under a misapprehension that petitioner had not completed his basic combat training, for it concluded its review of the enlistment agreement by stating (Pet. App. C, p. xxiii):

> Before the plaintiff could take the mechanical maintenance course he had to complete basic combat training. It is apparent that plaintiff had not complied with this requirement, as he had only been at Fort Riley nine days when he was injured and obviously was engaged in basic combat training at the time of injury.

In fact, petitioner had completed his basic combat training prior to his injury, and neither petitioner nor the government ever has indicated otherwise (see Pet. 6).

Because of this misapprehension of the facts, the Court of Claims did not determine whether the failure to assign petitioner to his specialty immediately upon completion of his basic combat training constituted a breach of the enlistment agreement that provides a basis for jurisdiction under 28 U.S.C. 1491. In our view, there was no breach: the contract need not be read as providing for assignment to training in mechanical maintenance immediately after completion of basic training, but in any event the contract

explicity stated that petitioner could be transferred to other assignments "at any time" (Pet. App. A, p. x).[2] However, in view of the seriousness of petitioner's injuries, we believe that these questions of contract construction should be passed upon by a court.

Accordingly, this Court may deem it appropriate to vacate the judgment below and remand the case to the Court of Claims for its determination whether the failure to assign petitioner to his advanced individual training specialty immediately after completion of basic combat training constituted a breach of the enlistment agreement and, if so, whether petitioner is entitled to damages.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.

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[2]Moreover, while the Court of Claims had no occasion to reach the issue of damages, petitioner seeks damages that are not recoverable in contract; his injuries were not proximate and natural consequences of his assignment. See *Shelton* v. *United States*, Ct. Cl., No. 486-76, decided September 30, 1977; *Northern Helex Co.* v. *United States*, 524 F. 2d 707, 720 (Ct. Cl.); ALI, *Restatement, Contracts*, §330 (1932); Williston on *Contracts*, §1344 (3d ed. 1968).

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